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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

PETITION NOT PRINTED

RESPONSE NOT PRINTED

No. 57

BOB FRED ASHE,

Petitioner,

v.

HAROLD R. SWENSON, Warden
Missouri State Penitentiary,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

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The opinion of the Court of Appeals (A. 236) is reported at 339 F. 2d 40 (8th Cir. 1968).

The opinion of the District Court (A. 232) is reported at 289 F. Supp. 871 (W.D. Mo. 1967).

The opinion of the Supreme Court of Missouri (A. 227) affirming denial of motion to vacate sentence is reported at 403 S.W. 2d 589 (1966).

The opinion of the Supreme Court of Missouri (A. 223) affirming the conviction is reported at 350 S.W. 2d 768 (1961).

Jurisdiction

The judgment of the Court of Appeals was entered July 30, 1968 (A. 236). The petition for a Writ of Certiorari was filed August 17, 1968 and was granted March 3, 1969. The jurisdiction of this Court rests on Title 28 United States Code, Sec. 1254(1).

Provisions of Law Involved

The Fifth Amendment to the Constitution of the United States provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the Constitution of the United States provides in part:

> "Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State de-

prive any person of life, liberty, or property, without due process of law. . . ."

Article 1, Section 19, Constitution of Missouri, 1945 provides:

"That no person shall be compelled to testify against himself in a criminal cause, nor shall any person be put again in jeopardy of life or liberty for the same offense, after being once acquitted by a jury. . . ."

Section 560.120, Missouri Revised Statutes, 1959, provides:

"Every person who shall be convicted of feloniously taking the property of another from his person, or in his presence, and against his will, by violence to his person, or by putting him in fear of some immediate injury to his person; or who shall be convicted of feloniously taking the property of another from the person of his wife, servant, clerk, or agent, in charge thereof, and against the will of such wife, servant, clerk or agent by violence to the person of such wife, servant, clerk or agent, or by putting him or her in fear of some immediate injury to his or her person, shall be adjudged guilty of robbery in the first degree."

Section 560.135, Missouri Revised Statutes, 1959, provides:

"Every person convicted of robbery in the first degree by means of a dangerous and deadly weapon shall suffer death, or be punished by imprisonment in the penitentiary for not less than five years, and every person convicted of robbery in the first degree by any

other means shall be punished by imprisonment in the penitentiary for not less than five years. . . ."

Supreme Court Rule 27.26, Missouri Revised Statutes, 1959, provides:

"A prisoner in custody under sentence and claiming a right to be released on the ground that such sentence was imposed in violation of the Constitution and laws of this State or the United States, . . . may file a motion at any time in the court which imposed such sentence to vacate, set aside or correct the same. . . . If the court finds that the judgment was rendered without jurisdiction or that the sentence imposed was illegal or otherwise subject to collateral attack, or that there was such a denial or infringement of the constitutional rights of the prisoner as to render the judgment subject to collateral attack, the court shall vacate and set aside the judgment and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate. . . . "

Question Presented

May the State put a defendant again in jeopardy by relitigating an issue of fact tried by a jury and necessarily found in his favor in a criminal case when

(a) the occasion for the attempted relitigation is a subsequent criminal prosecution against the same defendant arising from the same transaction and

(b) in the second prosecution, as it was in the first, the issue of fact litigated is essential to the question of guilt?

Statement

During the early hours of January 10, 1960, six men were engaged in a poker game in the basement of the home of John Gladson at Lee's Summit, Missouri. Mr. Gladson was one of the participants. The five others were Donald Knight, Jerry Freeman, Orville Goodman, Richard McClendon, and Ray Roberts. Mrs. Gladson was in bed upstairs (A. 8).

A substantial amount of money in currency and checks was on the poker table. Three masked men broke into the basement armed with a shotgun and pistols (A. 16-17). The players other than Gladson (the men seemed to know that he had a heart condition) (A. 9) were ordered to remove their trousers and were tied up. The three men took the items from the table and also took money, rings, watches, and other property from the persons of the players (A. 10, 24, 34). A man also entered Mrs. Gladson's bedroom, ripped out the telephone and tied her with the telephone cord (A. 18). The robbers then departed in Roberts' automobile, which was parked outside the Gladson house (A. 25).

Shortly thereafter, Roberts' car was found by a security guard in a field some distance away. The guard observed three men, who then ran away from the car (A. 47-48). A shotgun was found in back of the car and the State Highway Patrol was summoned (A. 49).

John Edward Johnson, Eric Larson and Thomas Brown were apprehended later that morning by one State trooper not far from where the car was discovered (A. 60-61). The Petitioner was arrested by a second man from the State Patrol (A. 64).

Seven complaints were filed against each of the four in Magistrate Court. These charged, respectively, the robbery of each of the six poker players and the theft of Roberts' automobile. On a preliminary hearing all four were bound over to the circuit court for trial. Later seven separate informations were filed. Six of these named the Petitioner, Larson, and Johnson; a seventh, for the car theft, named all four. Another six informations were filed against Brown alone.

On May 2, 1960, the Petitioner went separately to trial in Jackson County, Missouri Circuit Court on an amended information citing prior convictions and charging him for the robbery of Donald Knight (A. 5). Four of the six victims (Gladson, Knight, McClendon and Roberts) testified about the event and described their individual losses. Roberts and McClendon gave testimony implicating the Petitioner. Gladson could make no positive identification of him (A. 11), and Knight could not identify anyone (A. 21). The defense offered no testimony and waived closing argument. The jury's verdict was "not guilty due to insufficient evidence" (A. 90).

The State then proceeded to try the Petitioner on the second of the seven informations filed against him, amended to make the Missouri Habitual Criminal Act applicable and charging robbery of Ray Roberts (A. 94). On June 21, 1960 the Petitioner filed his Motion to Dismiss Autrefois Acquit (A. 97). The motion was taken up, heard, considered by the circuit court, and overruled (A. 104).

On the same day, June 21, 1960, the Petitioner's second trial began in the same state court and before the same judge on the charge of robbing Ray Roberts. Mrs. Gladson gave testimony, and three of the basement victims who

testified at the first trial—Knight, Gladson and Roberts—were called again. Mr. McClendon was not called. This time John Gladson and Ray Roberts identified the accused as one of the robbers. This time the jury returned a verdict of guilty (A. 220), and on October 10, 1960 judgment was entered sentencing the Petitioner to 35 years in the penitentiary of the State of Missouri (A. 222).

The Petitioner appealed his conviction to the Supreme Court of Missouri, asserting double jeopardy and urging the application of collateral estoppel. The conviction was affirmed (*State* v. *Ashe,* 350 S.W.2d 768 [1961]). The court ruled that the Petitioner had not been placed in double jeopardy and refused to apply collateral estoppel, citing among other cases, *Hoag* v. *New Jersey,* 356 U.S. 464 [1958].

Four years later the Petitioner, pursuant to Rule 27.26 of the Missouri rules of criminal procedure, moved to vacate his sentence, again asserting double jeopardy and collateral estoppel. The motion was denied by the state circuit court and on appeal the denial was affirmed (*State* v. *Ashe,* 403 S.W.2d 589 [1966]). The court again cited *Hoag* v. *New Jersey, supra.*

On July 27, 1966 the Petitioner filed his habeas corpus petition with the United States District Court for the Western District of Missouri. Double jeopardy and collateral estoppel again were asserted. On July 27, 1967, citing *Hoag,* the district court denied the petition for habeas corpus. (*Ashe* v. *Swenson,* 289 F. Supp. 871 [W. D. Mo. 1967].)

On September 18, 1967 the Petitioner appealed from the decision of the district court to the United States Court

of Appeals for the Eighth Circuit. The court of appeals, on July 30, 1968, affirmed the action of the district court. (*Ashe* v. *Swenson*, 399 F.2d 40 [8th Cir. 1968].)

Summary of Argument

The State of Missouri violated the Fourteenth Amendment to the Constitution when, after Petitioner's criminal trial ended in acquittal because the jury determined in his favor the question of his participation in a single robbery episode, it again litigated this same essential issue in a second criminal trial.

A. The verdict of the jury at the Petitioner's first trial, "not guilty due to insufficient evidence," resulted solely from the State's failure to prove that the Petitioner was one of the robbers. The most careful review of the record of that trial leads inevitably to the conclusion that there could have been no other basis for the verdict. Four of the victims testified, each solidly establishing the basic facts surrounding the commission of the crime. Only two of them, however, offered testimony purporting to place the Petitioner on the scene and cross-examination brought out significant weaknesses in their testimony on that point. The defense did not dispute the State's case apart from the question of Petitioner's participation. It introduced no evidence of its own and waived final argument. Against a background of uncontroverted evidence of armed robbery by a group of men, the jury found that the Petitioner's guilt had not been established by adequate proof.

B. The charge upon which the Petitioner was tried a second time was based upon the same occurrence and was

identical to that involved in his first trial except that it named a different victim and different property. Much of the evidence offered by the prosecutor to prove the second charge was the same as that used in the attempt to prove the first charge, except that greater efforts were made to establish the identification of the Petitioner. In each case, the prosecutor relied on proof purporting to show that a group of men acting in concert robbed all the victims and that the Petitioner was one of the group. No evidence was presented of specific acts allegedly committed by the Petitioner amounting to an offense against the victim specified in either charge. Both juries were called upon to determine the identical question of the Petitioner's participation as one of the group of robbers. The first jury's determination that the Petitioner was not one of the group cannot be reconciled with the second jury's contrary conclusion.

C. By relitigating the same issue of fact against the same defendant in a second trial arising from the same occurrence, the State of Missouri violated the Due Process clause of the Fourteenth Amendment. The protections of the first eight amendments to the Constitution are made applicable to the states by the Due Process clause insofar as they deal with principles fundamental to our concepts of justice. In *Palko* v. *Connecticut*, 302 U.S. 319 (1937), the Court held only that a state could retry an accused on the principal charge after his conviction of a lesser included offense was reversed on appeal by the state for legal error. Such a procedure was judged not to contravene the essence of the ban on double jeopardy to the extent that it might be incorporated in the Due Process clause of the Fourteenth Amendment. However, the Court

noted that less technical and more fundamental instances of double jeopardy might encroach upon Fourteenth Amendment rights. Such rights were violated in this case because the action taken by the State of Missouri goes to the "basic core" of the double jeopardy concept.

In determining that the Petitioner's second trial was undertaken in violation of the Fourteenth Amendment, the Court need not conclude that both trials involved the "same offense" within the literal language of the Fifth Amendment. Due process requires compliance not with the technicalities but with the substance of the principles underlying the rule against double jeopardy.

By sensitive application of the doctrine of collateral estoppel developed in civil cases, the courts have sought to maintain meaningful substance in the double jeopardy concept under circumstances of the modern codification of criminal law. Although the applicability of the doctrine of collateral estoppel in criminal proceedings has created some controversy in marginal areas, its utilization here is essential to preserve the basic rights guaranteed by the Fifth and Fourteenth Amendments. Due process is denied when a defendant is placed twice in jeopardy on the cardinal issue of his participation in a single criminal transaction.

ARGUMENT

The State of Missouri Violated the Fourteenth Amendment to the Constitution of the United States by Litigating at a Second Criminal Trial of the Petitioner the Question of His Participation in a Single Robbery Episode.

A. By Its Verdict, "Not Guilty Due to Insufficient Evidence," the Jury at the Petitioner's First Trial Determined That the State Had Failed to Prove He Participated in the Crime.

It is clear from the transcript of the first trial that the identification of the accused was the only contested issue. No rational analysis could support the hypothesis that the State somehow failed to convince the jury that some group of men had committed the crime of robbery against Donald Knight and others. The controverted issue was not whether Knight had been robbed, but only by whom. The testimony of any one of the victims was sufficient to establish the basic elements of the crime, and four of the victims testified. Each gave essentially the same version of the entire sequence of events, but left in doubt the issue of Petitioner's participation.

It was directly established that the victim named in the charge in this first trial, Donald Knight, suffered a monetary loss (A. 17). The defense made no effort to refute any of this evidence and even waived final argument. At the close of the evidence the judge instructed the jury that Knight's loss of "any money," together with other facts, would sustain a finding of guilty (A. 86). Another instruction suggested to the jury the standard language for a general verdict, "we find the defendant not guilty of rob-

bery . . . " (A. 89). Instead the jury responded, "we . . . find the defendant . . . not guilty *due to insufficient evidence*" (A. 90).

On the record, it is clear that only one essential element of the proof could have been considered as insufficiently established. That element was the identification of the accused as one of the group that committed the robbery.

Donald Knight said there were three robbers (A. 17, 20), but that he could not identify any of them "because I never did get a good look at them" (A. 21). John Gladson, closely examined, said he recognized one of the men because his mask slipped during the robbery (A. 10). He too, said that three masked men had broken into the basement and committed the actual acts of robbery (A. 9), but he could not identify the Petitioner as a participant (A. 11).

Only two of the victims gave any support to the State's contention that the Petitioner was one of the robbers. The first was McClendon, Petitioner's uncle by marriage. But McClendon based his identification solely upon the fact that when he heard the Petitioner's voice at the police line-up it "sounded very much like" one he had heard at the scene of the robbery (A. 28-29). He could not be sure, however, that Petitioner had ever been in the basement at the time of the crime and he positively identified the three hold-up men as Johnson, Larson and Brown (A. 29-30).

The other first trial witness on identification, Roberts, was equally inconclusive. He testified consistently with the other victims that only three men had broken into the Gladson basement (A. 33, 43, 46). He claimed to recognize the Petitioner by recalling generally the "size and actions" of the robbers. He was unable to state what any of them

had done; he could not identify the Petitioner by voice and he admitted he had never seen his face (A. 43-45).

The glaring insufficiency of the State's effort to place Petitioner on the scene is not merely the weakest of several factors that could have concerned the jury. Instead, it is the only factor which could have caused them to acquit on the ground of "insufficient evidence."

The transcript of the Petitioner's second trial dramatically shows the prosecution's recognition that the first acquittal had been for lack of identification. Heavy and careful emphasis was now placed on that issue. Each of the victims who testified was moved to offer something on the point. Knight, who at the first trial was unable to identify any one as a participant, this time remembered that one of the three robbers spoke as though he "had much in his mouth, thicked-tongued" (A. 116). Gladson, who at the first trial could identify only Brown as a participant, now placed the Petitioner as one of the three actual robbers, citing his size, his hair and stating that he remembered him as a robber who could not speak plainly (A. 129-30). Roberts still spoke of "size and actions" but now added that he remembered one of the robbers "seemed like he had something wrong with his voice, mush in his mouth . . .," and that this factor had contributed to his identification of the Petitioner at the line-up (A. 145, 155). Next Trooper Ferguson, the arresting officer, testified:

> "A. He (Ashe) showed me his tongue. He had a laceration back on the tongue, more in the middle part, it looked to me like, it still had sutures in the tongue, and it was causing him—it was bleeding and he kept spitting this blood from this lacerated tongue. It was swollen and made it hard for him to talk.

"Q. How did it affect his speech?

"A. He didn't talk too coherently, talked sort of like he had a mouthful of something, something in his mouth, sort of a mushy sort of speech. His tongue was swollen quite a bit. It was giving him—he kept telling me it was giving him some pain" (A. 178-79).

All three of the victims who testified at this second trial—Gladson, Knight and Roberts—gave testimony purporting to identify the Petitioner as one of three men who carried out the actual robbery (A. 116, 129-30, 145-46, 156). McClendon, Petitioner's uncle by marriage and the witness who knew him best, at the first trial had positively stated that the, three actual participants in the holdup were Johnson, Larson and Brown. But McClendon was not called by the State to testify at the second prosecution.

After having heard this much-refined and carefully selected testimony on the issue of identification, along with virtually the same evidence on the general details of the occurrence, the second jury, on the same instructions as had been given to the first, returned a verdict of guilty against the Petitioner.

B. The Offense Alleged at the Second Trial Required Proof of the Same Essential Fact of Participation That the State Had Already Failed to Establish.

The Information on which the Petitioner's second trial was based (A. 94) is almost identical to the Information used at the first trial (A. 5). Both allege the offense of Robbery, said to have been committed at the same time and place. The only differences are that each names a different victim and lists different property taken.

The evidence surrounding the sequence of events, from the interruption of the poker game through the arrest of the four suspects, was presented to both juries essentially in the same manner. At each trial a number of the victims gave their versions of what happened at the Gladson home. They left not the slightest doubt that a group of men collectively robbed each of the poker players.

The Missouri Supreme Court erroneously oversimplified the ultimate questions in each of the two trials as being, respectively, "Did Ashe rob Don Knight?" and, "Did Ashe rob Ray Roberts?" (A. 225). It speculated, without any justification from the record, that the first jury might not have believed that any property was taken from Knight (A. 225-6). But the record shows that the single question at issue in both trials was whether Ashe was one of the group who, at the same time and place, robbed both Knight and Roberts.

The State's case, in both trials, was based on the concept of a group of men, acting in concert, robbing individuals who were gathered together. Its theory of prosecution was never to prove particular acts of the accused against the particular victim named in the information, and in fact it presented no such evidence. The few instances in the record which tend to show that particular robbers did certain things add nothing to the case against the Petitioner except insofar as they contribute to the account of the group's activities.

The first jury, to convict, had to answer not one but two basic questions in the affirmative: "Did a group of men rob Don Knight?" and "Was Ashe one of the group?" The fact of the robbery was not challenged and the answer to the first question had to be an obvious, uncontroverted

affirmative. Since the jury acquitted, its finding as to the second was a clear negative.

The second jury also had two questions to resolve: "Did a group of men rob Ray Roberts?" and "Was Ashe one of the group?" The first question, again, posed no difficulty. The other was precisely the same question on which the first jury had found an insufficiency of evidence to convict. The State, however, succeeded in eliciting enough testimony on identification to satisfy the second jury.

The issue of Petitioner's identity was itself the identical and the sole disputed issue in both trials. The same group indisputably robbed Knight and Roberts, at the same time and place. Petitioner's acquittal on the charge that he was one of the group that robbed Knight cannot be reconciled with the subsequent verdict that he was one of the group that robbed Roberts. And in subjecting the Petitioner twice to criminal trial on this same issue, the State of Missouri violated his constitutional rights.

C. The State of Missouri Violated Petitioner's Rights Under the Due Process Clause of the Fourteenth Amendment by Placing Him a Second Time in Jeopardy on the Key Question of His Participation in the Robbery.

1. *The State Action Infringed the Basic Principles Underlying the Ban on Double Jeopardy.*

The action of the State in relitigating the same cardinal issue against the Petitioner following his acquittal is inconsistent with the rights guaranteed by the Constitution of the United States. The Fifth Amendment specifically prohibits placing an individual in jeopardy twice for the

same offense. But the principles of justice which this prohibition is designed to protect go beyond instances of repeated criminal prosecution on the identical charge. The same vice is inherent in any situation in which an individual is subjected to the harassment of repeated criminal prosecution based on disproven assertions of criminal complicity.

Were such repeated trials to be permitted, eventual conviction of a defendant would be assured, regardless of the merits of the charge. No individual defendant could match the resources at the command of the prosecution, and the ultimate depletion of his means and will to defend himself would be inevitable. In addition, successive trials of the same issue of fact would permit the prosecution to perfect its presentation by remedying the deficiencies of proof which led to the earlier acquittal. Insufficiencies of evidence could be supplemented and testimony adverse to the theory of prosecution could be observed and omitted in the subsequent trial. *Commonwealth* v. *Thatcher,* 364 Pa. 326, 71 A.2d 796, 798 (1950).

Accordingly, the fundamental core of the Fifth Amendment protection against double jeopardy must be found to have been carried over to the states under the Due Process clause of the Fourteenth Amendment. *United States ex rel. Hetenyi* v. *Wilkins,* 348 F.2d 844, 855 (2d Cir. 1965). Certainly the threat and the actuality of subsequent prosecution resting on the identical key issue of fact previously adjudicated in a defendant's favor is inconsistent with the concept of ordered liberty which the Fourteenth Amendment was designed to guarantee.

The Court need not decide in this case where the specific guarantees of the Fifth Amendment against double jeop-

ardy are carried over *in toto* by the Fourteenth Amendment and hence made binding against the various states. There is, therefore, no necessity to overrule the holding in *Palko* v. *Connecticut*, 302 U.S. 319 (1937) which found no violation of the Due Process clause in a Connecticut statute which permitted the state to retry a defendant on a principal charge after his conviction of a lesser included offense was reversed on appeal by the state for legal error. As noted by Mr. Justice Cardozo in *Palko:*

> "What the answer would have to be if the state were permitted after a trial free from error to try the accused over again or to bring another case against him, we have no occasion to consider. We deal with the statute before us and no other. The state is not attempting to wear the accused out by a multitude of cases with accumulated trials. It asks no more than this, that the case against him shall go on until there shall be a trial free from the corrosion of substantial legal error. . . . This is not cruelty at all, nor even vexation in any immoderate degree." 302 U.S. at 328.

The present case is the antithesis of *Palko*. There the Court found that what technically might qualify as double jeopardy involved no deprivation of due process. Here what might not be double jeopardy under a narrow, technical reading clearly subjected the Petitioner to a burden inconsistent with the due process guarantee. The Court is faced here with the situation which *Palko* reserved for later decision. The disputed question in Petitioner's first trial was whether he was one of the band who robbed a group of men including Donald Knight and Ray Roberts.

In a trial free from error, he was acquitted because the jury found insufficient evidence. Thereafter he was tried again and his fate again rested on the identical issue—whether he had been one of the band who robbed a group of men including Ray Roberts and Donald Knight. The second jury reached a conclusion opposite to the first and found the Petitioner guilty.

There is, it should be noted, no necessity for Petitioner to urge or for this Court to find any impropriety in the State of Missouri's motivation in trying Bob Fred Ashe twice on the same basic issue. No finding of intent to harass or to wear out the accused is essential to a conclusion that his constitutional rights have been violated.

Nor need the Court, in order to provide Petitioner with the constitutional protections implicit in the Due Process clause, determine that the robbery of multiple victims involves a single offense rather than multiple offenses. Constitutional guarantees should not be allowed to turn on niceties of pleading or the technicalities of state codification of criminal law. Here, having been cleared by a jury on the one contested element common and cardinal to each of the seven informations, the Petitioner was protected by the Constitution of the United States from being placed again in jeopardy because of the State's unwillingness to accept the conclusion reached by that jury.

The present record highlights the vices inherent in a policy that permits repeated prosecution grounded on an identical issue of fact. Moreover, the record shows a misuse of Missouri law, under which multiple offenses may be derived from a single criminal transaction, as a vehicle for seeking multiple opportunities to secure conviction of a criminal defendant.

From the standpoint of the prosecution, the testimony in the Petitioner's first trial was unsatisfactory both in what was said and in what was not said. No witness was able positively to identify the Petitioner as one of the robbers. Four of the victims testified and each stated that only three men broke into the Gladson basement and committed the actual acts of robbery (Gladson, A. 9; Knight, A. 17, 20; McClendon, A. 23, 28, 30, 31; Roberts, A. 33, 43, 46). And one of the witnesses, Richard McClendon, specifically identified the three men as Johnson, Larson and Brown, the three defendants in the companion criminal cases (A. 30). The three men named by Mr. McClendon were the same three men arrested by State Trooper Millsap (A. 60-61). Millsap had responded to a call from Mr. Westerfield who, during his night patrol at Unity Farm in the early morning of January 10th, had found three men in a field beside the stolen car (Westerfield, A. 46-50; A. 159-162; Millsap, A. 60-63; A. 170-172). Petitioner Ashe, it might be noted, was separately arrested by State Trooper Ferguson (Ferguson, A. 64; A. 176).

Mr. McClendon's testimony should have been particularly persuasive to the first jury because, of all the witnesses, he was the only one who had any close association with the Petitioner. He was, in fact, the husband of Petitioner's aunt. Of the four victims who testified at the first trial, however, Mr. McClendon was the only one missing at the second trial. The other three were somehow able, the second time around, to place Petitioner as one of the three men who perpetrated the actual robbery, and to do so in flat contradiction to Mr. McClendon's first trial testimony (Knight, A. 116; Gladson, A. 129-30; Roberts, A. 145-6, 156).

The Due Process clause sanctions no such dry run as a prelude to subsequent prosecution. The interests of justice cannot be served and the concept of ordered liberty maintained if the prosecutor is enabled to test his case and, if he proves unsuccessful, to bring the same ultimate issue before a second jury with the benefit of the experience gained in the prior proceeding. In a second prosecution, inadequacies can be rectified, favorable witnesses rehearsed and reenforced and unfavorable testimony eliminated. A policy which permits such a practice infringes the principles inherent in the prohibition against double jeopardy and thus violates the Due Process clause of the Fourteenth Amendment.

It may be that the State of Missouri is entitled to treat the contemporaneous robbery of six victims as six offenses. It may be that the State can proceed to trial separately on each of the six related charges, unless or until a jury acquittal gives rise to an estoppel. *Ciucci* v. *Illinois*, 356 U.S. 571 (1958). But the State cannot, consistent with due process of law, utilize this proliferation of offenses and proceedings as a means to ensure one conviction. It has done so in this case and thus has deprived the Petitioner of his constitutional rights.

The four suspects apprehended shortly after the robbery incident were each charged under seven separate informations. The other three were convicted in the State's first attempt to prove their participation and no effort was made to bring any of them to trial on the other six charges (A. 206). Insofar as the Petitioner was concerned, however, the State was unsuccessful in proving to one jury the fact of his participation. He was therefore brought to trial on a second of the seven charges and, when the second

jury found him guilty, no action was taken with respect to the remaining five. On the State's theory, however, even a second acquittal would not have cleared the Petitioner. There would have been nothing to prevent the prosecution from proceeding on the seventh charge after six juries had absolved him of any involvement in the robbery at the Gladson home. The Constitution contemplates the running of the jury gauntlet but once on such question of complicity. The protection it prescribes cannot be circumvented by ingenuity in defining a multiplicity of offenses arising from a single episode.

The uniform course of the decided cases is consistent with the recognition that there need not be complete identity in the offenses charged in order for the principle involved in the ban against double jeopardy to be invoked. Were identity of offense to be regarded as the key, the Double Jeopardy clause of the Constitution would have been rendered a virtual nullity under the circumstances of modern criminal practice. At common law, a single criminal occurrence was treated as a single offense, regardless of the number of victims involved. The updating of the double jeopardy concept essential to preserve its vitality under modern conditions has occurred primarily through the doctrine of collateral estoppel. Lugar, *Criminal Law, Double Jeopardy, and Res Judicata*, 39 Iowa L. Rev. 317 (1954). As developed in civil proceedings, the doctrine of collateral estoppel prevents the relitigation of the same issue of fact by the same parties. Its underlying rationale is one of convenience and necessity. Social interests demand that the courts not be burdened by litigants unwilling to accept defeat and that there be an end to litigation over a disputed issue of fact.

As applied in criminal cases to protect individual rights, the concept of collateral estoppel has an importance that transcends such mere practical considerations. It becomes in fact essential to the meaningful application of the protection against double jeopardy. Accordingly, it deserves and it has received, at least tacitly, constitutional status.

The outer reaches of the applicability of collateral estoppel in retaining the vitality of the protection against double jeopardy have not as yet been fully determined. This case cannot set those ultimate borders. Instead, it can only afford the opportunity for this Court to give conclusive authority to the proposition that the protection against double jeopardy does not turn on technical distinctions in defining offenses.

The Petitioner's second trial brought the same contesting parties into the same courtroom, before the same judge. *People* v. *Lo Cicero*, 14 N.Y.2d 374, 200 N.E.2d 622 (1964). It presented to a second jury an essential factual issue which the first jury had determined in the accused's favor, not a "mediate" question, *The Evergreens* v. *Nunan*, 141 F.2d 927 (2d Cir. 1944), or a question of law, *Watts* v. *United States*, 402 F.2d 676 (D.C. Cir. 1968). The earlier acquittal had been won at a trial based on a single information and thus in no way constituted an alternative or compromise verdict, *United States* v. *Maybury*, 274 F.2d 899 (2d Cir. 1960). Precisely the same issue resolved by the acquittal also was pivotal to the question of guilt at the second trial, *United States* v. *Kramer*, 289 F.2d 909 (2d Cir. 1961). Whether the Constitution demands the widest application of the doctrine of collateral estoppel to criminal proceedings need not now be determined. All that the Court need now decide is that the principle inherent in

the Fifth Amendment's ban on double jeopardy is a part of the due process of law which a state must accord to a criminal defendant and that this principle is transgressed when a defendant absolved by one jury is compelled to face another jury on the same issue of his involvement in a criminal incident.

2. *The Preclusive Effect of Prior Litigation on Subsequent Civil and Criminal Proceedings Has Consistently Been Recognized in Anglo-American Law.*

Since the origins of jurisprudence, the principle has existed that litigation in any form may have preclusive effects upon subsequent attempts at relitigation. *Hopkins* v. *Lee*, 19 U.S. (6 Wheat.) 109, 114 (1821). The principle of res judicata and collateral estoppel has long applied to both civil and criminal cases. *The Queen* v. *Miles*, 24 Q.B.D. 423, 431 (1890); *Rex* v. *Segan and Potter*, 90 Eng. Rep. 554 (K.B. 1696).

In the early days of this country, when statutory offenses were relatively few, the principle of collateral estoppel was encompassed within the broad concept of double jeopardy and required no separate articulation. Comment, 65 Yale Law Journal 339, 341-3 (1956). Moreover, all the states embraced the double jeopardy safeguard either by incorporating it in their constitutions or applying it as a common law principle. *Brock* v. *North Carolina*, 344 U.S. 424, 435 (1953). See Mo. State Constitution, Article One, Section 19. It was, of course, made applicable to the Federal Government through the Double Jeopardy clause of the Fifth Amendment.

As the number of statutory offenses has proliferated through codification and new statutes, instances of double

jeopardy "for the same offense" have become uncommon. Where prosecutions have offended the basic principle that a man should not be compelled to prove his innocence twice (*State* v. *Little*, 87 Ariz. 295, 350 P.2d 756, 764 [1960]), but where the Double Jeopardy clause was technically inapplicable, collateral estoppel has been applied to give modern significance to the protection against double jeopardy. *Coffey* v. *United States*, 116 U.S. 436, 443 (1886); see also *Frank* v. *Mangum*, 237 U.S. 309, 333-4 (1915).

In *United States* v. *Oppenheimer*, 242 U.S. 85 (1916), this Court relied upon the principle of collateral estoppel in federal trials to breath life into the Double Jeopardy clause of the Fifth Amendment. In applying the principle to criminal prosecutions Mr. Justice Holmes wrote:

> "The safeguard provided by the Constitution against the gravest abuses has tended to give the impression that when it did not apply in terms, there was no other principle that could. But the Fifth Amendment was not intended to do away with what in the civil law is a fundamental principle of justice . . ., in order, when a man once has been acquitted on the merits, to enable the Government to prosecute him a second time." 242 U.S., at 88.

In *Sealfon* v. *United States*, 332 U.S. 575 (1948), a prior acquittal on a charge of conspiracy to defraud the United States was held to bar a second prosecution for aiding and abetting because the issue of agreement, which was crucial in the second prosecution, had been determined in the defendant's favor in the conspiracy trial. The Court cited *Oppenheimer* in applying collateral estoppel prin-

ciples and carefully evaluated the record of the prior proceeding to determine the considerations upon which the jury grounded its verdict.

Thus, the relevance of the collateral estoppel doctrine to the constitutional guarantee against double jeopardy has been tacitly recognized and in federal courts today it is settled that a defendant in a criminal case can assert collateral estoppel against the Government in the proper circumstances. *Watts* v. *United States,* 402 F.2d 676, 684 (D.C. Cir. 1968).

At least twenty-eight states either apply the "same transaction" test to define double jeopardy or have indicated concurrence with the federal view that collateral estoppel is available to criminal defendants in appropriate cases. None have unconditionally rejected the doctrine of collateral estoppel and only four have expressed reluctance to apply it in principle. Annot. 9 ALR3d 203, 229 (1966). See also *People* v. *Haran,* 27 Ill.2d 229, 188 N.E.2d 707, 709 (1963).

For example, in *Harris* v. *State,* 193 Ga. 109, 17 S.E.2d 573 (1941), the defendant was tried for robbery after his acquittal on a murder charge arising from the same transaction. Circumstances indicated that the first jury was not convinced he participated in the crime. The defendant's appeal was based on double jeopardy. His appeal was successful although the Georgia court recognized that the case did not involve former jeopardy in the usual sense, since the offenses were not identical as a matter of law. The court stated that the outcome was based on "the principle of res judicata which may be included in a plea under the broader doctrine of former jeopardy . . ." (17 S.E.2d at 579).

Here, as in *Harris* v. *State*, it might be said that double jeopardy does not exist in a technical sense. But it is clear that this is a proper case for the application of the doctrine of collateral estoppel by the Court to preserve the fundamental principle of justice underlying the Double Jeopardy clause.

The special circumstances that led the majority of this Court to conclude that the State was not estopped from a second trial in *Hoag* v. *New Jersey*, 356 U.S. 464 (1958), are not involved here. The prosecution here could claim no surprise in the patent inability of its first trial witnesses to present convincing testimony identifying the Petitioner. In *Hoag* the collateral estoppel question was not decided because the majority of the Court felt bound by a determination of the state court that the prior acquittal might have turned on an issue other than the identity of the defendant. *State* v. *Hoag*, 21 N.J. 496, 122 A. 2d 628, 632-3 (1956). In this case the sole controverted issue at both trials was whether Bob Fred Ashe was one of the group of robbers. The district court characterized this as "the single issue in real contest" (A. 235).

It is noteworthy that in *State* v. *Cormier*, 46 N.J. 494, 218 A.2d 138 (1966), the New Jersey Supreme Court expressly overturned its earlier *Hoag* decision, stating:

> "The doctrine of collateral estoppel should not be applied grudgingly. The State's resources are sufficient to enable it to prepare and present its case thoroughly. It did that during the first trial. The fact that it then failed to persuade the jury . . . was no reason for allowing it to try again. The broadening policy considerations in favor of safeguarding individual rights of defendants and the need for conserving

public energies as well as public funds strongly suggest that where, as here, a jury has considered and rejected the State's contention in favor of the defendant's contention on the issue submitted as the crucial one, the matter should be permitted to rest in its entirety." 218 A.2d, at 146.

3. *Fundamental Justice Demands That the States Recognize the Preclusive Effect of a Prior Acquittal Based on a Key Issue of Fact.*

Under *Palko*, the Fourteenth Amendment selectively incorporates those Bill of Rights guarantees offering protection against practices "repugnant to the conscience of mankind." 302 U.S., at 323.

Unquestionably, the basic core of the protection against double jeopardy, represented by this case, is incorporated in the Fourteenth Amendment and binding upon the states. Fourteenth Amendment due process embodies those principles of justice that extend to "the very essence of a scheme of ordered liberty." *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937). Its principles are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder* v. *Massachusetts*, 291 U.S. 97, 105 (1934). It involves not "merely personal standards but the impersonal standards of society . . ." *Louisiana ex rel. Francis* v. *Resweber*, 329 U.S. 459, 470 (1947).

Nothing is more fundamental to our system of criminal justice than the finality of a criminal acquittal. It may be that in some cases, such as *Palko*, the departure from standards normally followed imposes no "hardship so acute and shocking that our polity will not endure it." 302 U.S., at 328. But when the procedure followed by any state can

utterly ignore an acquittal and, for all practical purposes, reverse it, we breach the very foundation of Double Jeopardy and Due Process. Missouri's practice in this case provided the means to ignore the Petitioner's acquittal and bring him to trial on successive charges arising from the same event until a conviction was obtained.

Modern meaning for the protection against double jeopardy requires recognition of the applicability of collateral estoppel. The right to due process of law is violated when an individual is compelled to risk a second jury's determination of an issue previously resolved in his favor by a jury verdict.

The issue here is one of fundamental justice. By refusing to honor a clear determination by the Petitioner's first jury on the essential fact in controversy, the State subjected the Petitioner to an unfair procedure in the nature of double jeopardy and contrary to recognized considerations of basic fairness. Just as this procedure would violate the Fifth Amendment if practiced by the federal government, it transgresses the Fourteenth Amendment when practiced by a state.

Conclusion

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed, and directions given to issue the Writ of Habeas Corpus.

Respectfully submitted,

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